IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No.

C. H. DOUGLAS; MRS. AUBREY McGEHEE, Individually and As Representative of Her Deceased Husband, Aubrey McGehee; and R. GORDON BURT, JR., Mayor of the City of McComb City, Mississippi,

Petitioners

vs.

THE CONGRESS OF RACIAL EQUALITY,

Respondent.

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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INTRODUCTORY STATEMENT

This reply is necessitated by the gross inaccuracy of some of Respondent's statements, but more especially by the necessity for a correct consideration of Respondent's claimed standing in this case. If Respondent's contentions be allowed to stand it can safely be predicted the litigation load on Federal Courts will increase tremendously. The

few short minutes necessary to consider this reply, and if necessary to reconsider action taken on this petition, may be worth untold hours to future judicial administration.

I THE CORPORATION CORE HAS NO STANDING TO BRING THIS SUIT

(A) CORE Has No Standing to Assert the Constitutional Rights of Other Persons Not Parties to This Litigation.

This is not a class action. It is a suit in which a corporation asks:

> "May Congress of Racial Equality (a New York corporation) assert the rights of freedom of speech and assembly?" (Reply page 4)

If this Court has not answered that question point blank by stating:

> "As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the *liberty* guaranteed by the due process clause is the liberty of natural, not artificial, persons." *Hague* v. *C.I.O.*, 307 U.S. 496, 527. (Emphasis supplied)

then the English language is incapable of definite expression.

The identical privileges and immunities here claimed were there involved—freedom of speech and assembly. The decision is authoritative precedent which the Court of Appeals has not properly heeded. Respondent's attempted aspersion to the effect that this point was only made in concurring opinions does not detract from the vitality of this authority. The assertion of that right was

one of the points in issue and the rights of the corporate party were finally denied by this court on that precise premise.

In a footnote to its majority opinion in this case, the Fifth Circuit stated:

> "Congress of Racial Equality may assert the constitutional rights of its members. See *NAACP* v. *Alabama*, 357 U.S. 449."

This authority (the only one cited on this point) is entirely inappropriate to permit CORE to litigate this case.

> In *NAACP* v. *Alabama*, 357 U.S. 449, this Court stated: "To limit the breadth of issues which must be dealt with in particular litigation, this Court has generally insisted that parties rely only on constitutional rights which are personal to themselves. Tileston v. Ullman, 318 U.S. 44, 63 S. Ct. 493, 87 L. Ed. 603; Robertson and Kirkham, Jurisdiction of the Supreme Court (1951 ed.), § 298. This rule is related to the broader doctrine that constitutional adjudication should where possible be avoided. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-348, 56 S. Ct. 466, 482-483, 80 L. Ed. 688 (concurring opinion). *The principle is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court.*
>
> "If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association. *To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion.*" (Emphasis supplied.)

Bates v. City of Little Rock, 361 U.S. 516, and *Louisiana v. NAACP*, 366 U.S. 293, are almost identical in legal import and fact content to the *Alabama* case.

Respondent also cites *NAACP v. Button*, 371 U.S. 415. The statement in that case to the effect that a corporation may assert the privileges and immunities of individual citizens *must* be considered in the light of the citations supporting that statement. All of the cases there cited deal with situations where *only* the corporation was capable of effectively asserting the privilege involved. If the individual persons in those cited cases had attempted to assert the privilege claimed, that very act would have defeated it. *It is not so here.*

McCabe v. A. T. & S. F. Ry. Co., 235 U.S. 151, is another authority which illuminates the need for certiorari. It negated the right of a litigant to sue on behalf of other non-parties where the persons suing had suffered no deprivation of the rights asserted. The reasoning is certainly sound. If such were not the rule, the amount of litigation would mount astronomically. For this and the very salutary reasons discussed in *NAACP v. Alabama, supra*, this rule should not be abrogated here where no showing whatever is made that Respondent Corporation must protect the asserted right or see it fail. Any natural person who claimed any personal constitutional immunity or privilege had been abridged by the Court's order here could certainly have appealed.

(B) CORE Has No Standing to Assert the Right of Free Speech and Assembly in Its Own Behalf.

In an attempt to support its standing to prosecute the appeal in its own right, the Respondent Corporation has placed its principal reliance upon *Grosjean v. American*

Press Co., 297 U.S. 233, which held a unique state tax, unlike anything ever imposed on newspapers in the previous history of all of the United States, amounted to a calculated device in the guise of a tax to limit the circulation of certain newspapers. The Court held that the corporation had a *proprietary* standing to assert that the confiscation of their *property* violated their right to equal protection and due process of law. Freedom of the press is included in the express terms of the First Amendment and is thus brought under the ambit of 14th Amendment protection from state encroachment. The vital distinction is that there the Corporate Respondent's *own property rights* were there in jeopardy not liberty or privileges or immunities. The Court was careful in *Grosjean* to recognize that:

> "A corporation, we have held, is not a 'citizen' within the meaning of the privileges and immunities clause (of the 14th Amendment)."

Contrary to the position of the publishing companies in the *Grosjean* case, the corporation, which is Respondent here, can only contend that it is entitled to assert privileges and immunities which it does not have and is incapable of having or enjoying.

Since *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357, this Court has consistently held that the fictitious legal entity called a corporation is not a "citizen" within the meaning of the privileges and immunities clause of the 14th Amendment to the Constitution. It cannot assemble. It cannot speak. The fact that it is a "person" capable of owning and dealing with *property* and possessed of rights to equal protection of its *property* and due process of law as respects its *rights of property* within the framework of the same amendment, does not modify or detract from these holdings in the slightest.

Respondent also cites *NAACP* v. *Button* in support of its claim to standing to assert a "right" of its own to free speech and assembly. We respectfully submit the Court should most carefully consider the authority cited in the *Button* Case to support the statement that NAACP had a direct standing to test the constitutionality of a statute which curtailed a primary business purpose of that corporation, to wit: urging individual citizens to pursue legal recourse as parties, *for the protection of the rights of such individuals.*

If the Court does not limit this holding to the import of the *Grosjean* case upon which *Button* relied, it will, in our opinion, open a veritable Pandora's Box. It is difficult to imagine how many lawsuits a corporation might bring if it could sue every time it thought *someone else* might need to go to court.

Assuming *arguendo* that the record showed the purpose of CORE's incorporation, which it does not, and so assuming further that one of the reasons Respondent was incorporated was for the purpose of instituting law suits to vindicate the constitutional rights of individual citizens, it would be a complete non-sequitur to hold that by its own act of incorporation it could thus *create a right in itself* which would enable it to circumvent this Court's long standing and salutary policy of permitting litigation only by those whose rights are directly affected, except only where a representative is the sole efficient means of preserving the rights of such non-parties.

It at once becomes apparent that a contrary holding would create a vast amount of litigation *on both sides* of civil rights issues and *on both sides of* numerous other areas of litigation in today's high-pressure group action world. If a pressure group can create a right to litigate

for others by the simple expediency of incorporating to do so, it is difficult to imagine how many cases the corporation would litigate that would never otherwise be filed: the very volume of which would be damaging to sound judicial administration (and no doubt would frequently damage the rights of those who are involuntarily or unknowingly brought before the court).

REPLY TO RESPONDENT'S STATEMENTS

Respondent states:

> "This petition for certiorari is *one more dilatory tactic* by the City of McComb, Mississippi, in a campaign to delay giving Congress of Racial Equality and its members the right freely to use interstate bus facilities at McComb." (Emphasis supplied) (page 5).

This statement is false. The record before this Court clearly demonstrates that petitioners did not even *apply* to this Court or to the Court below for a stay pending a ruling on this petition. The mandate of the Court of Appeals has been filed in the District Court since June 10, 1963, and that Court's injunction has long ago ended.

The statement was always false. The District Court's Preliminary Injunction expressly excluded ". . . any impingement upon the normal, usual or ordinary travel of any person in interstate or intrastate commerce to, through or from the City of McComb, Mississippi." The only conduct ever enjoined was that which was designed to foment violence and provoke breaches of the peace. This is an obvious attempt to divert the court's attention from the fact that this is *not* a segregation controversy, but a very basic peace-keeping issue which is not unique to McComb or its bus terminal. (Cf. this court's own regulations, 40 U.S.C., § 13j.)

Respondent states:

> "The injunction was more than a simple interference with speech, it was a prior restraint of speech, as evidenced by *the simple fact that members of CORE have not been in the McComb bus station since 1961.*" (Emphasis supplied) (page 5)

and also alleges that it is:

> ". . . directly engaged in activities of speech and assembly." (page 9)

Respondent must now realize the absence of record support in this case for the decision of the Court of Appeals and thus chooses to interject matters wholly outside the proof made. If this "simple fact" had the least relevancy it was easily capable of proof, which the Respondent did not choose to make. The record is likewise completely silent as to the purpose of the Respondent's corporate existence or its activities. (See footnote 1, Judge Gewin's dissent, Appendix to Petition, A. 26.)

In a footnote the Corporate Respondent states:

> "This action was originally brought against 'Congress of Racial Equality, John Doe and Mary Doe.' It is plain, then, that petitioners originally intended this action to run against individuals, members of CORE, as well as against the organization. This state of the facts cannot be changed now by *drawing the petition herein against CORE alone.*" (Emphasis supplied) (page 9)

The short answer to this position is that *only the corporation, CORE,* was enjoined: *Only the corporation* appealed. *Only the corporation* is respondent here.

CONCLUSION

This is no mere technicality. We respectfully submit that, in conflict with the decisions of this court, the Fifth Circuit has now so extended an exception to a salutary rule limiting litigation that it has, in practical effect, abolished the rule itself. If this is not corrected it will inevitably have a tremendous impact on already burdened court calendars. It is bound to provoke numerous constitutional controversies contrary to the announced determination of this Court to avoid such adjudications where possible. Certiorari should be granted.

Respectfully submitted,

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